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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 576

GILBERT P. SIMONS, as Executor of the Last Will and Testament of KATE R. SIMONS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

GEORGE TROSK,
Attorney for Petitioner.

GEORGE TROSK,
LESTER J. TANNER,
of Counsel.

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(Italics ours.)

The Government's brief is not responsive to the question presented.

Petitioner does not dispute that the Deed of Trust executed in 1931 conferred a general power of appointment on decedent. But the statute says that a general power may be "partially released," and that, if it is,

> "*the subsequent exercise of such power shall not be deemed to be the exercise of a general power of appointment.*"

Consequently, the question presented is whether or not, in the interim between the creation of the power in 1931 and the exercise of it at decedent's death in 1949, the power had been partially released.

The Government asserts (Brief, p. 7) that the property subject to the power should be included in decedent's taxable estate because, up to the time of her death, decedent could have exercised the power in any manner she pleased *"if her testamentary capacity were restored."* But the fact is that her testamentary capacity was *not,* and continually from a date prior to October 21, 1942, *could not be,* restored. The learned District Court found (Appendix, p. 14-a) that

> *"decedent totally lacked testamentary capacity to execute a new will or alter her 1940 will from a date prior to October 21, 1942 until her death"*

and held that

> "her testamentary designation coupled with her subsequent incapacity, *as a practical matter, had the same effect as a partial release of the power."*

Consequently, in arguing that decedent could have exercised the power in any manner she pleased, "if her testamentary power were restored," the Government assumes an hypothesis which is contrary to the uncontested Finding of Fact and Opinion of the learned District Court.

The Government comments (Brief, p. 6) that the property subject to the power would be includible in decedent's taxable estate if decedent had "failed to exercise the power." The relevance of this comment, in the light of the facts, is hard to see. The undisputed fact is that decedent did *not* default in the exercise of the power. We are, consequently, not concerned with what the result would have been if she *had* defaulted. Decedent exercised the power and the only question is: Had she *partially released* it before it was exercised by her death? If she had, the statute expressly provides that her exercise of the power is not taxable.

The Government argues (Brief, p. 6) that the property subject to the power should be included in decedent's taxable estate because, *as originally created,* "the power is a

general power * * *." But a partial release of a testamentary power *always* relates to a power which, as originally created, was general. It is, accordingly immaterial that the power, as originally created, was general; all that matters is *the extent to which the donee was legally able to exercise the power at the time of her death.* As to that there is no dispute: at the time of her death, and for the seven years immediately preceding her death, decedent was legally and incurably incapable of appointing to herself, her estate or the creditors or either, or to anyone other than the individuals specified by her in the will she executed in 1940.

If decedent, after October 21, 1942, had executed a valid agreement not to change the appointment as made in her 1940 Will, there would have been a partial release of the power, and the subsequent exercise thereof on decedent's death would not have been taxable. As to that there is no dispute. We expected to find in the Government's brief some discussion of the question which naturally arises, i.e.:

> Is not decedent's legal incapacity to change her will as effective for tax purposes as an agreement not to change it?

Petitioner contends that this question should be answered in the affirmative, and in our petition we have cited authorities which we believe support that contention. The Government has failed to even refer to this question, much less to attempt to distinguish the authorities cited by us.

New York, N. Y., January 11, 1956.

Respectfully submitted,

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LESTER J. TANNER,
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